

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES GRIFFIN and GENERAL SERVICES ADMINISTRATION,
REGIONAL OFFICE, San Francisco, Calif.

*Docket No. 96-1690; Submitted on the Record;
Issued August 20, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that appellant did not sustain any emotional condition as a result of his federal employment; and (2) whether the Office properly found that appellant had abandoned his request for a hearing before an Office hearing representative.

On October 4, 1994 appellant, a 50-year-old contract administrator, filed a claim for benefits for an occupational disease claiming that he had developed stress-related mental and physical illnesses as a result of verbal abuse and management abuse by his immediate supervisor. Appellant first attributed his condition to his employment on April 18, 1994. Appellant stopped work on September 30, 1994 and returned to work on November 1, 1994.

Appellant alleged that on or about April 26, 1994, he began to feel depressed, physically ill and in a constant state of agitation and aggravation due to the hostile conditions and environment under which he worked at the employing establishment. Appellant alleged that his immediate supervisor, Ms. Jo Ann Lew: (1) refused to allow him to participate in training courses, while allowing his co-workers to participate in such courses; (2) refused to renew warrant authority he possessed prior to being placed under Ms. Lew's supervision; (3) spoke in a rude and demeaning tone and manner to him during group meetings; (4) had threatened and harassed him; (5) refused to grant him sick and annual leave, and would not accept doctor certificates for days missed from work; (5) would not let him use the restroom prior to the end of his tour of duty; (6) had refused to provide him with compensatory and/or overtime pay for working on his off-days to complete projects assigned with due dates that conflict with his scheduled off dates; (7) had assigned him work projects beneath his ability; (8) had issued numerous wrongful infraction and reprimand letters to him, as well as falsely bad mouthed him to management; (9) had rummaged through his desk drawers when she thought he had left for the day; and (10) had restricted him from talking to management, union representatives, etc., regarding his concerns pertaining to his workplace treatment.

A Kaiser Permanente medical report dated August 5, 1994, noted that appellant was transferred from Los Angeles to San Francisco and that he was under disciplinary action due to a work performance issue. The report diagnosed appellant's condition as an adjustment disorder and indicated that appellant could return to full duty immediately. A Kaiser medical report dated October 18, 1994 diagnosed appellant's condition as an adjustment disorder with depression. This report indicated that appellant was capable of working light duty under a different supervisor.

On November 29, 1994 the Office requested that appellant submit additional information concerning his claim. The Office also asked appellant to provide a comprehensive medical report from his physician.

In a December 14, 1994 statement, Ms. Lew, appellant's supervisor, indicated the dates when sick leave was approved. She stated that appellant was reassigned from the Los Angeles office to San Francisco on or about January 25, 1994. She wrote that appellant had received two letters of reprimand, one for issuing a modification to a Government contract without having the authority to do so, and the other for disrespectful conduct and insubordination towards her, and attached copies of the same. Ms. Lew stated that she no longer had direct contact with appellant and that he was now supervised directly by her supervisor. Ms. Lew also stated that appellant's work load was significantly decreased in order to accommodate his requests for reassignment.

In a letter dated January 31, 1995, appellant responded to the Office's request for further explanation. Appellant did not provide any specific dates of particular alleged factors or provide any witness statements or other evidence to corroborate his allegations.

In a letter dated May 16, 1995, the employing establishment responded to appellant's allegations and provided a copy of appellant's position description. Enclosed was a letter denying appellant's step two grievance which found that appellant's supervisor: (1) did not undermine appellant's credibility by assigning projects with restrictive dates; (2) had never ordered appellant to work overtime; (3) had not "bad-mouthed" him to management or other employees; (4) the matter of alleged misconduct did not concern a performance matter; and (5) appellant's supervisor properly rated appellant's performance of the work assigned him during the rating period and the rating complied with applicable employing establishment regulations and the national agreement. The employing establishment also submitted two September 19, 1994 reprimand letters issued to appellant by the employing establishment regarding his acting without proper authority and his disrespect and insubordination toward Ms. Lew.

In a May 16, 1995 letter, Ms. Lew offered a detailed refutation of appellant's allegations. She stated that appellant's actual work assignments did not cover the full range of duties and tasks described in his position description. Ms. Lew stated that appellant had attended more formal training courses than anyone else in the division, overtime was not required, there was never a need for appellant to work overtime and appellant was not required to work off days. She indicated that appellant was given guidance and instructions for work assignments when he requested it and whenever assignments were not properly completed. Ms. Lew stated that appellant was apprised his warrant would not be renewed before it expired on April 20, 1994 but, in spite of the notice, he signed an order to purchase maintenance services on April 29, 1994 without the proper authority and, thus, was subjected to disciplinary actions. Ms. Lew further

stated that the employing establishment had responded whenever possible with changes in appellant's work schedule and assignments, and approval of his leave requests. Ms. Lew stated that even though appellant left his office innumerable times without notifying his supervisor, he was given a lot of leeway to take care of his personal concerns. Ms. Lew stated that the employing establishment has tried to accommodate appellant but he continued to disrupt the workplace and had performed less work than anyone else in the branch. Ms. Lew indicated that appellant perceived directions which he chose not to follow as harassment and discrimination. Ms. Lew stated that appellant had been counseled on his hours of work, as he was on an alternative work schedule, and had been told to work his full tour of duty as it had been witnessed that he left his office 7 to 10 minutes early. Ms. Lew explained that on one occasion, she needed a folder for a project which was assigned to appellant, and, as she did not find him in his office, she assumed he left early, so she checked his desk for the folder. When appellant returned, he became angry that she was in his office and Ms. Lew explained that she was looking for the folder and had looked around because she assumed that appellant had left for the day. Appellant responded that he had gone to the restroom and asked sarcastically couldn't he go to the restroom. Ms. Lew stated that she had already discussed the employing establishment's policy with him that employees were expected to work up to the end of their workdays, and appellant interpreted that to mean she was telling him that he could not use the restroom.

By decision dated June 8, 1995, the Office denied appellant's claim on the grounds that he failed to establish that he sustained an emotional condition as a result of his employment. In the attached memorandum, the Office found that Ms. Lew did not renew appellant's warrant authority because he failed to complete work assignments, follow agency regulations in regards to acquisitions and contract administration, and follow simple guidelines and instructions. The Office also found that Ms. Lew denied appellant's sick leave for the period of September 12 to 14, 1994 until appellant provided sufficient medical evidence that he was incapacitated from work. The Office found that these events were administrative actions that were appropriate and not an abuse of management power. The Office additionally found that the accepted incidents were not part of appellant's regular or specially assigned duties and, because they were not considered to be in the performance of duty, any reaction by appellant regarding the renewal of his warrant authority or issuance of leave was considered to be self-generated and not in the performance of duty. The Office found that appellant had not provided sufficient evidence to support the acceptance of the other events alleged.

In a letter dated July 7, 1995, appellant requested a hearing regarding his claim.

In a November 29, 1995 letter, the Office informed appellant that a hearing would be held on January 11, 1996. This letter was sent to appellant's address of record and listed appellant's representative as receiving a carbon copy.

By letter dated December 20, 1995, which was faxed to the Department of Labor, Branch of Hearing and Review on the same date, appellant's representative requested a postponement until a Merit Systems Protection Board (MSPB) proceeding involving appellant was concluded.

The Office on January 11, 1996 subsequently informed appellant that the scheduled hearing was canceled, due to the temporary closure of the federal government, and advised that

the hearing would be rescheduled. This letter was sent to appellant's address of record, with a copy forwarded to appellant's attorney.

By letter dated January 19, 1996, the Office informed appellant that a hearing would be held on February 29, 1996. This letter was sent to both appellant and appellant's attorney.

In a March 18, 1996 decision, the Office found that appellant abandoned his request for a hearing, as he failed to appear at the time and place set for the hearing and did not show good cause for his failure to appear within 10-calendar days after the time set for the hearing.

The Board finds that appellant has not met his burden of proof to establish that he sustained an emotional condition while in the performance of duty.

Workers' compensation law is not applicable to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within the coverage of workers' compensation. These injuries occur in the course of the employment and have some kind of causal connection with it, but nevertheless, are not covered because they are found not to have arisen out of the employment. Disability is not covered where it results from an employee's frustration over not being permitted to work in a particular environment or to hold a particular position, or secure a promotion. On the other hand, where disability results from an employee's emotional reaction to his regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within coverage of the Federal Employees' Compensation Act.¹

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by factors of his federal employment.² To establish his claim that he sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that he has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.³

In the present case, appellant has not substantiated a compensable factor of employment. Appellant essentially attributes his emotional condition to supervisory harassment and discrimination. However, mere perceptions of harassment and discrimination are not compensable under the Act.⁴ Appellant has not identified specific occurrences on specific dates that he feels constituted harassment or discrimination. He also has not submitted any evidence,

¹ 5 U.S.C. § 8101 *et seq.*; *Joel Parker, Sr.*, 43 ECAB 220 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

² *Pamela R. Rice*, 38 ECAB 838 (1987).

³ *Donna Faye Cardwell*, 41 ECAB 730 (1990).

⁴ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

such as witness statements, to support that he was harassed or treated unfairly. Instead, evidence from the employing establishment refutes that appellant was harassed or treated unfairly and indicates that appellant was rude and abusive to his supervisor.

Certain of appellant's allegations of supervisory and management abuse of power pertain to administrative or personnel matters. The general standard for allegations involving administrative or personnel matters is that although these are related to employment, they are primarily duties of the employer rather than regular duties of the employee. In order to establish a compensable factor, there must be evidence of error or abuse by the employing establishment.⁵

Appellant has alleged verbal abuse and management abuse of power by his immediate supervisor, Ms. Lew, which include the denial of training courses, the denial of leave requests, overtime pay, compensatory pay, the assignment of work projects with restrictive due dates, the tone and manner his supervisor used in to him and during group meetings, the refusal to allow leaving work before 4:00 p.m., the refusal to renew warrant authority, the issuance of wrongful infraction and reprimand letters, and his belief that his supervisor bad-mouthed him to management and rummaged through his desk drawers when she thought he left work. The Office found Ms. Lew did not renew his warrant authority and that she had denied his sick leave for the period September 12 to 14, 1994. The Office noted, however, that these administrative actions were appropriate and were not an abuse of management power. When evaluating employing establishment actions, the Board applies a reasonableness standard.⁶ The record indicates that appellant's warrant authority was not renewed due to his failure to complete work assignments, follow agency regulations, and follow guidelines and instructions. Similarly, it is reasonable to conclude that sick leave may be denied pending medical evidence of incapacitation from work.⁷ As appellant's sick leave was restored after medical evidence was submitted the evidence does not establish that the employing establishment committed error or abuse in this instance.⁸

Appellant has alleged other abusive behavior by his supervisor, but he has not provided sufficient detail and supporting evidence to substantiate any of his remanding allegations. The allegation that his supervisor blocked appellant's efforts to participate in training courses are denied by the supervisor who advised that appellant received more training than his coworkers and had sufficient training to do his job.⁹ No other evidence, regarding this matter, was submitted by appellant. Consequently there is insufficient evidence to show that the employing establishment erred or acted abusively in denying training. With respect to the denial of overtime/compensation pay, work schedules, work underload, and the assignment of work projects with projected due dates, appellant's supervisor indicated that during the time she

⁵ See *Donald E. Ewals*, 45 ECAB 111 (1993).

⁶ See *Frederick D. Richardson*, 45 ECAB 454 (1994).

⁷ See *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Michael Thomas Plante*, 44 ECAB 510, 516 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

⁸ See *Lorraine E. Shroeder*, 44 ECAB 323 (1992).

⁹ See *Jose L. Gonzalez-Garced*, 46 ECAB 559 (1995).

supervised appellant there was never a need to work overtime and that once appellant voluntarily came to the office during nonwork hours, but did not have prior approval to do so, and then became upset when he could not get retroactive overtime approved since it was against employing establishment regulation.¹⁰ Here, there is no evidence of error or abuse by the employing establishment.

Although appellant's supervisor noted retrieving a folder in appellant's office when he was not there, she advised that she needed the folder for a work project and thought appellant had left for the day. The supervisor's explanation is reasonable. There is no evidence of error or abuse.

As appellant failed to submit sufficient evidence to corroborate his claim to establish that the employing establishment erred or acted abusively, he has not established a compensable factor of employment that is substantiated by the record and, therefore, has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.¹¹

The Board also finds that the Office properly found that appellant had abandoned the request for a hearing.

Section 8124(b) of the Act¹² provides claimants under the Act a right to a hearing if they request a hearing within 30 days of the Office's decision. Pursuant to section 10.137 of the applicable regulations¹³ a scheduled hearing may be postponed upon written request of a claimant or her representative if the request is received by the Office at least three days prior to the scheduled date of the hearing and good cause for the postponement is shown. If a claimant fails to appear for a scheduled hearing, he has 10 days after the date of the scheduled hearing to request that another hearing be scheduled. Where good cause for the failure is shown, a second hearing will be scheduled.

In the instant case, appellant failed to appear at the scheduled hearing on February 29, 1996, and the record does not show that he provided appropriate notice that he would not attend, and made no attempt to postpone the hearing date. Further, appellant failed to show good cause within 10 days of the scheduled hearing date as to why he failed to appear. Based on these facts, therefore, the Office properly concluded under section 10.137 that appellant's request for hearing was abandoned.

While appellant alleges on appeal that his representative wrote a letter dated January 29, 1996 to the Department of Labor's Branch of Hearing and Review requesting a continuance until after the MSPB hearing on his appeal and supplied a copy of the same, there is no record of this

¹⁰ See *Michael Thomas Plante*, *supra* note 7; *Joe E. Hendricks*, 43 ECAB 850 (1992); *Gloria* ECAB 161 (1991).

43

¹¹ As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; see *Margaret S. Krzycki*, 43 ECAB 496 (1992).

¹² 5 U.S.C. § 8124.

¹³ 20 C.F.R. § 10.137.

letter in the case file. As the Board's jurisdiction to decide appeals from final decisions of the Office is limited to reviewing the evidence that was before the Office at the time of its final decision,¹⁴ under the circumstances of this case, the Office's finding of abandonment was proper.

The decisions of the Office of Workers' Compensation Programs dated March 18, 1996 and June 8, 1995 are affirmed.

Dated, Washington, D.C.
August 20, 1998

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

¹⁴ 20 C.F.R. § 501.2(c). Appellant may submit such argument and any supporting evidence in a request for review to the Office pursuant to 5 U.S.C. § 8128.